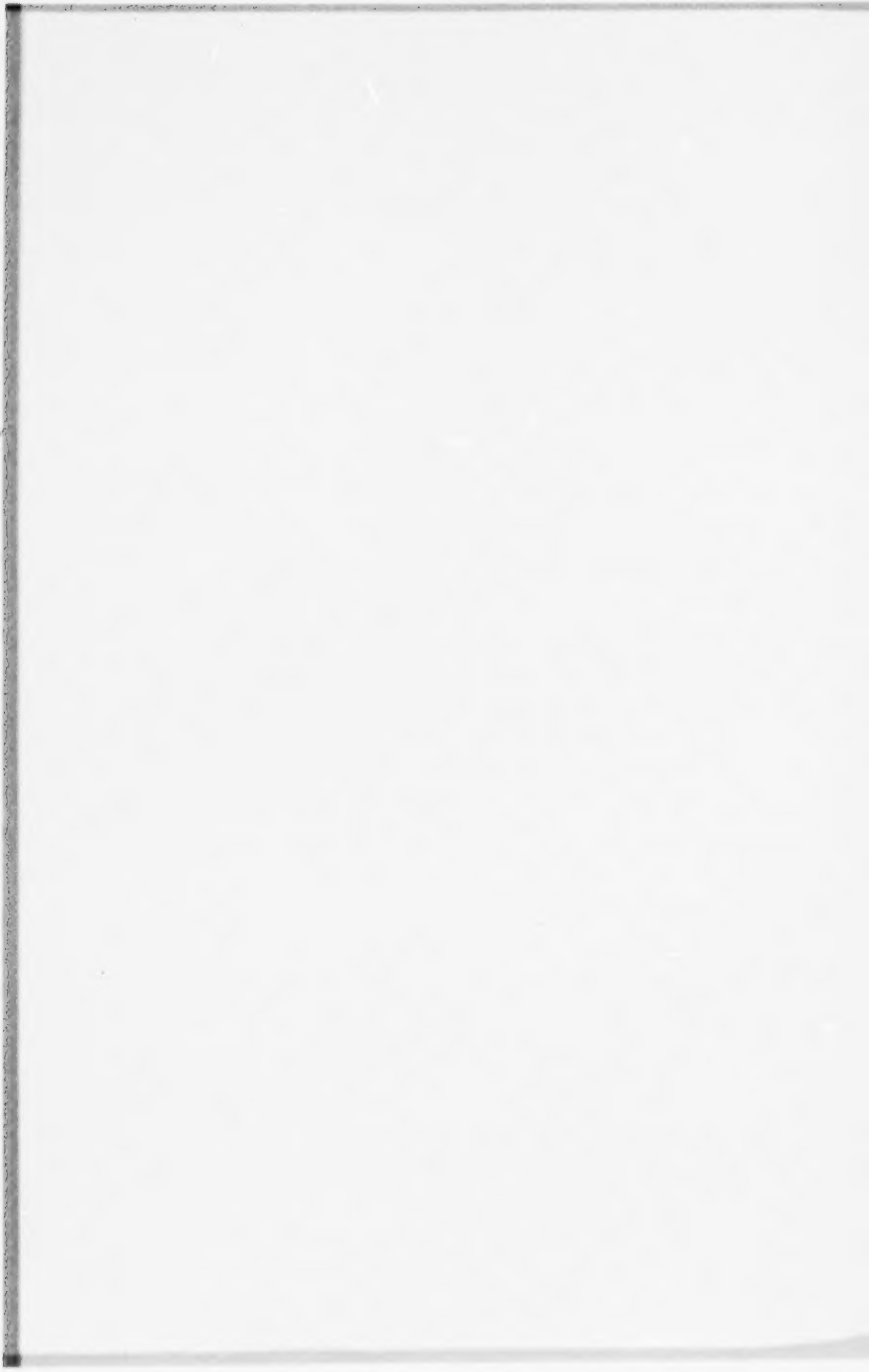

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945.

No. 216

CLARK OIL COMPANY AND PLYMOUTH CLARK OIL COMPANY,

Petitioners,

vs.

PHILLIPS PETROLEUM COMPANY, ET AL.,

Respondents.

BRIEF OF RESPONDENTS, PHILLIPS PETROLEUM COMPANY, THE PURE OIL COMPANY, SINCLAIR REFINING COMPANY, SHELL OIL COMPANY, INC., SOCONY-VACUUM OIL COMPANY, INC., SKELLY OIL COMPANY, CONTINENTAL OIL COMPANY, AND CITIES SERVICE OIL COMPANY, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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The opinion of the Circuit Court of Appeals appears on pages 135 to 142 of the Record, and is reported in 148 F. (2d) 580 (April 11, 1945). The opinion of the District Court appears on pages 114 to 126 of the record, and is reported in 56 F. Supp. 569 (D. C. D. Minn., 3rd Div., 1944).

Jurisdiction.

Petitioners assert that the jurisdiction of this Court is invoked on the ground that the case is based upon an alleged violation of the Sherman and Clayton Anti-Trust Acts. Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. A. Section 1; Act of October 15, 1914, 38 Stat. 730, 15 U. S. C. A. Section 15 (petition for writ of certiorari, p. 1).

Statement of the Case.

This action is brought by petitioners, Clark Oil Company and Plymouth Clark Oil Company, to recover under the antitrust laws treble the damages alleged to have been sustained by them as a result of the conspiracy for which the respondents were convicted in *United States* v. *Socony-Vacuum Oil Co., Inc., et al.*, 310 U. S. 150 (1940) (Madison Oil Case).

Petitioners allege in their complaint that they are jobbers engaged in the business of buying and selling gasoline (R. 67); they further allege that they paid a higher tank car price for gasoline during the years 1935 and 1936 as a result of the conspiracy charged in the Madison Oil Case (R. 71); and they seek to recover treble the amount of such increase in price irrespective of pecuniary damage in their business or property (R. 112-113).

Petitioners' purchase price was determined under a contract with Phillips Petroleum Company which provided that petitioners would be guaranteed a margin of 3½¢ per gallon on the gasoline bought and resold by them (R. 20). Petitioners admitted at a pre-trial conference that they were not claiming that they had sustained any lessening in their margins on gasoline bought and resold, that their claim of damages was in fact based on gasoline bought and resold in the ordinary course of business, and that they were seeking to recover treble the amount of the increase in price paid by them under a so-called illegal exaction theory, regardless whether such increase in price resulted in a pecuniary loss in their business or property (R. 112-113).

Respondents filed a motion for summary judgment, which was based on certain exhibits, the pleadings and the subsequent stipulations at the pre-trial conference (R. 76,

113). No affidavits were filed and no evidence was offered by petitioners in opposition to this motion. Hon. Gunnar H. Nordbye granted respondents' motion and wrote an opinion which appears at pages 114-126 of the Record, and in 56 F. Supp. 569 (D. C. D. Minn., 3rd Div., 1944). Judge Nordbye held:

> (1) A jobber, who is engaged in the business of buying and selling gasoline, is not entitled to recover damages merely because there has been an increase in the price of gasoline as a result of a conspiracy, but he must show that he sustained a pecuniary loss as a result of such increase in price.
>
> (2) This principle was first enunciated in the so-called treble damage oil cases by the Eighth Circuit Court of Appeals in *Twin Ports Oil Co.* v. *Pure Oil Co.*, 119 F. (2d) 747 (C. C. A. 8th, 1941), certiorari denied 314 U. S. 644, rehearing denied 314 U. S. 711, and was followed by the Seventh Circuit Court of Appeals in *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co., Inc., et al.*, 138 F. (2d) 967 (C. C. A. 7th, 1943), certiorari denied 321 U. S. 792.
>
> (3) The plaintiffs do not suggest that they be permitted to amend their second amended complaint, and, therefore, this case should be dismissed on the merits (R. 120, 125).

The Circuit Court of Appeals affirmed this judgment and found as a fact that no damages resulted to petitioners, that the gasoline was all sold in due course, and that the increase in price was passed on to their customers. The Court held that petitioners were seeking "not compensation for damages suffered by defendants' illegal acts, but profits because of said acts", and that as there was no basis for recovery of compensatory damages, the trial court correctly entered a summary judgment in favor of respondents (R. 138-139, 142).

Since this is an appeal from an order sustaining defendants' motion for summary judgment, defendants will assume for the purpose of this appeal that the allegations in plaintiffs' complaint and the indictment in the Madison Oil Case in regard to the conspiracy and the increases in prices are true.

SUMMARY OF ARGUMENT.

I.

The petition for writ of certiorari should be denied because the finding of fact of both the trial court and the Circuit Court of Appeals that petitioners sustained no damages is supported by these undisputed facts: petitioners admitted at the pre-trial hearing that they were not claiming any lessening in their margins and that their claim was based on gasoline which they bought and resold (R. 112-113); they had the protection of the guaranteed margin provision of their supply contract (R. 20); and they based their case upon the Madison Oil Case in which the conspiracy charged by the Government and found to exist by the Supreme Court was one which had for its purpose the raising of the whole price structure of gasoline in the Mid-Western area, which would include both the buying and selling prices of petitioners (R. 37-38). *United States* v. *Socony-Vacuum Oil Co., Inc., et al.*, 310 U. S. 150, 192 (1940). Petitioners did not offer any evidence or affidavits in opposition to the motion for summary judgment.

II.

The petition for writ of certiorari should be denied because petitioners' contention in this case that a person is entitled to recover under the Clayton Act treble the amount of any increase in price resulting from a conspiracy, irrespective of pecuniary loss, has been decided already by the Supreme Court adversely to this contention. Petitioners' claim is based upon the rule of *Southern Pacific Company, et al.* v. *Darnell-Taenzer Lumber Company, et al.*,

245 U. S. 531, 534 (1918) and other tariff overcharge cases, in which the Court has held that a shipper in *privity* with the carrier can recover under Section 1 of the Interstate Commerce Act for the amount of any tariff overcharge paid by him without proof of pecuniary loss. The Supreme Court has held that this rule is not applicable to an action for treble damages under the antitrust laws, and that a person bringing suit under such laws must show that he has sustained a pecuniary loss as a result of the increase in price paid by him. *Keogh* v. *Chicago & Northwestern Railway Company, et al.*, 260 U. S. 156, 164-165 (1922). Likewise, in companion cases to the present one, both the Seventh and Eighth Circuit Courts of Appeals have held that a jobber of gasoline is not entitled to recover the amount of the increase in a price resulting from the conspiracy charged in the Madison Oil Case, but that he must show that he has sustained a pecuniary loss as a result of such increase in price. *Twin Ports Oil Co.* v. *Pure Oil Co.*, 119 F. (2d) 747 (C. C. A. 8th, 1941), certiorari denied 314 U. S. 644, rehearing denied 314 U. S. 711; *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co., Inc., et al.*, 138 F. (2d) 967 (C. C. A. 7th, 1943), certiorari denied 321 U. S. 792.

These decisions are in accord with the well-settled rule of treble damage cases under the antitrust laws that a person is injured in his property only "when his property is diminished". *Chattanooga Foundry and Pipe Works* v. *City of Atlanta*, 203 U. S. 390, 399 (1906).

III.

There is no conflict between the decision in the present case and that of the Second Circuit Court of Appeals in *Straus, et al.* v. *Victor Talking Mach. Co., et al.*, 297 F. 791 (C. C. A. 2d, 1924), because in that case Straus sustained a pecuniary loss which was measured exactly by

the increase in the purchase price to him. He was forced from a wholesale to a retail market, and he sustained a loss in the amount of this increase in price. In the present case petitioners admit that they are not claiming any lessening in their margins; and they do not deny that here the conspiracy has raised both their buying and selling prices and in addition that they had adequate protection from any loss under the guaranteed margin provision of their supply contract.

IV.

There is no conflict between the present case and the freight rate or tariff overcharge cases relied upon by petitioners. A tariff overcharge is recoverable under the Interstate Commerce Act as a matter of law, without proof of a pecuniary loss, and is recoverable only by persons in privity with the carrier. An action under the antitrust laws is not for the recovery of an overcharge or increase in price *as such*, but is "for threefold the damages by him sustained." Recovery is not limited to persons in privity with the wrongdoer, but extends to all persons who have sustained a pecuniary loss as a proximate result of the unlawful act. The Supreme Court has held that the freight rate overcharge cases are not applicable to an action for treble damages under the antitrust laws. *Keogh* v. *Chicago & Northwestern Railway Company, et al.*, 260 U. S. 156, 164-165 (1922).

V.

If the Court considers that compliance with Rule 38 is jurisdictional, the petition for writ of certiorari should be denied because petitioners failed to comply with Rule 38 of the Supreme Court Rules in that they did not serve respondents with a copy of the record within ten days after the filing in the Supreme Court.

ARGUMENT.

I.

The Petition for Writ of Certiorari Should Be Denied Because the Finding of Fact of the Circuit Court of Appeals That Petitioners Sustained No Damage Is Supported by the Undisputed Evidence in the Record.

Petitioners offered no affidavits or evidence in opposition to the motion for summary judgment but by stipulating at the pre-trial conference that they were not claiming any lessening in their margins and by basing their case upon the Madison Oil Case, they have conceded that the increase in their buying price was passed on to their customers or that the guaranteed margin provision of their contract protected them from any loss.

Petitioners agreed at the pre-trial hearing as follows:

> "Mr. Searls (Attorney for respondents): • • • It is my understanding, Mr. Michel, that you are not claiming under this complaint that your margin of profit was lessened on gasoline bought and resold.
>
> "Mr. Michel: That is correct, Mr. Searls, we are proceeding here upon what has been called in this proceeding and in the brief the illegal exaction theory, that a cause of action existed immediately upon the conspiracy taking effect and increasing the price which the plaintiff had to pay for its gasoline over what it would have had to pay but for the existence and the carrying out of the conspiracy.
>
> "Mr. Searls: Is it correct to say that your claim of damages is based on gasoline that was bought and was in fact resold in the ordinary course of business?
>
> "Mr. Michel: Yes.
>
> • • • • •

"The Court: I take it that it may be further stipulated by the parties that the record which is now being made at this pre-trial conference may be considered by the Court as part of the record before him when he passes upon the motion for summary judgment which has been made by the defendants in this proceeding.

"Mr. Searls: That's true for the defendants, your Honor.

"Mr. Michel: And that is true for the plaintiff." (R. 112-113.)

The indictment, which is an exhibit to petitioners' amended complaint, and other proceedings in the Madison Oil Case, which are a part of the record in this case, also establish that the increase in the tank car price (petitioners' buying price) was followed by an increase in the retail price (petitioners' selling price).[1]

Thus, the conspiracy charged by the Government and found to exist by the Supreme Court in the Madison Oil Case was one which had for its purpose the raising of the whole price structure of gasoline in the Mid-Western area (R. 37-38). As stated by the Supreme Court in *United States* v. *Socony-Vacuum Oil Co., Inc., et al.*, 310 U. S. 150 (1940):

"* * * the spot market was a 'peg to hang the price structure on.'" (p. 192)

1. The indictment in the Madison Oil Case charged that an increase in tank car prices will result directly in an increase in retail prices of gasoline and that defendants intentionally increased the tank car price of gasoline and in turn intentionally raised the general level of retail prices prevailing in the Mid-Western area, including the Western District of Wisconsin (R. 37, 38). The trial court, in his charge to the jury in that case, instructed them to return a verdict of "not guilty" unless they found that the defendants had intentionally raised the tank car price of gasoline "and in turn have intentionally raised the general level of retail prices prevailing in said Mid-Western area, including the Western District of Wisconsin" (R. 101).

See opening statements and closing arguments of Government counsel in Madison Oil Case (R. 103, 105-106, 2309, in *United States* v. *Socony-Vacuum Oil Co., Inc., et al.*, Nos. 346 and 347, 310 U. S. 150 (1940)), and opinion of the Supreme Court in *United States* v. *Socony-Vacuum Oil Co. Inc., et al.*, 310 U. S. 150, 190-192, 198-200 (1940). A court may take judicial notice of its records, *United States* v. *Pink*, 315 U. S. 203 (1942).

Within this price structure, refiners, brokers, jobbers, subjobbers, and dealers were buying and selling and consumers were buying. The same gallon of gasoline might pass through the hands of four or five purchasers before reaching the consumer and each sale would be based on this increased price structure. Thus, upon any unlawful rise in the tank car price, both petitioners' buying and selling prices were increased. The same was true as to the buying and selling prices of the service station dealers purchasing from petitioners. Only the consumer, who is not a reseller, found himself bearing the increase in price. Where the consumer has paid the amount of an unlawful increase, he, and he alone, is the person who has sustained an injury in business or property within the meaning of the Clayton Act. He is the one injured, because his property has been diminished. *Chattanooga Foundry and Pipe Works* v. *City of Atlanta*, 203 U. S. 390, 399 (1906). Where, as here, the conspiracy has raised the whole market structure, the jobber's or middleman's property has not been diminished. This was particularly true in the present case for the additional reason that petitioners' contract with their supplier guaranteed them a margin of 3½¢ per gallon on the gasoline bought and sold by them (R. 20). Both the trial court and Circuit Court of Appeals emphasized this as an additional fact which disclosed that petitioners sustained no pecuniary loss as a result of the price rise.

Petitioners do not deny and offered no affidavits to contradict the fact that there was an increase in the whole price structure of gasoline in the Mid-Western area, and that this, together with the guaranteed margin provision of their contract, prevented any loss or injury in their business or property. In fact, as suggested by the trial court, the price rise may have been a benefit to them as they were buying and selling on a rising market.

Petitioners contend that they are entitled to recover

treble the amount of any increase in their buying price irrespective of any pecuniary loss. Under such contention petitioners, their service station dealer, and the consumer would each be entitled to recover three times the amount of the original increase upon the same gallon of gasoline. This would create a total liability upon respondents of nine times the amount of the increase. In other cases where the ownership of the gasoline may have passed through the hands of a broker and sub-jobber, the amount of liability would be fifteen times the amount of the increase. Thus, the contention of petitioners that they are entitled to recover treble the amount of any increase in price as such, irrespective of pecuniary damage, is not only contrary to the express wording of the Clayton Act, which requires an injury in business or property, but would lead to the most absurd and inequitable results.

II.

The Petition for Writ of Certiorari Should Be Denied Because Petitioners' Contention That a Person Is Entitled to Recover Under the Clayton Act Treble the Amount of Any Increase in Price Resulting From a Conspiracy, Irrespective of Pecuniary Loss in Business or Property, Has Been Decided Already by the Supreme Court Adversely to This Contention.

Section 4 of the Clayton Act (15 U. S. C. A., Sec. 15), upon which this action is based, provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor * * * and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. * * *"

Petitioners' contention in this case is based upon the rule of *Southern Pacific Company, et al.* v. *Darnell-Taenzer*

Lumber Company, et al., 245 U. S. 531, 534 (1918), and other tariff overcharge cases, in which the Court has held that under Section 1 of the Interstate Commerce Act a person in *privity* with the carrier can collect the amount of any tariff overcharge paid by him without proof of pecuniary loss.

Respondents contend that an action under the Clayton Act, which expressly requires an injury in business or property, is not for the recovery of an overcharge *as such*, but is for the recovery of damages, that such action is not based on the existence of privity, and that the same rule requiring pecuniary loss as announced in *Pennsylvania Railroad Company* v. *International Coal Mining Company*, 230 U. S. 184, 202-203, 206 (1913), is applicable here.

The Supreme Court has held that the rule of *Southern Pacific Company, et al.* v. *Darnell-Taenzer Lumber Company, et al.*, 245 U. S. 531, 534 (1918), which is relied upon by petitioners, is not applicable to an action for treble damages under the antitrust laws, and that the rule requiring pecuniary loss, as announced in the International Coal Case, is controlling. In *Keogh* v. *Chicago & Northwestern Railway Company, et al.*, 260 U. S. 156 (1922), the Supreme Court, speaking through Mr. Justice Brandeis, said:

> "• • • Under § 7 of the Anti-Trust Act, as under § 8 of the Act to Regulate Commerce, *Pennsylvania R. R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, recovery cannot be had unless it is shown, that, as a result of defendants' acts, damages in some amount susceptible of expression in figures resulted. These damages must be proved by facts from which their existence is logically and legally inferable. They cannot be supplied by conjecture. To make proof of such facts would be impossible in the case before us. It is not like those cases where a shipper recovers from

> the carrier the amount by which its exaction exceeded the legal rate. *Southern Pacific Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531 * * *'' (pp. 164-165).

The Court held that the plaintiff must allege more than the mere payment of an increased price, the Court stating:

> ''* * * Exaction of this higher legal rate may not have injured Keogh at all; for a lower rate might not have benefited him. * * * Under these circumstances no court or jury could say that, if the rate had been lower, Keogh would have enjoyed the difference between the rates or that any other advantage would have accrued to him. The benefit might have gone to his customers, or conceivably, to the ultimate consumer'' (p. 165).

In companion cases to the present one, both the Seventh and Eighth Circuit Courts of Appeals have held that a jobber is not entitled to recover the amount of the increase in a price resulting from the conspiracy charged in the Madison Oil Case, but that he must show that he has sustained a pecuniary loss as a result of such increase in price. *Twin Ports Oil Co.* v. *Pure Oil Co.*, 119 F. (2d) 747 (C. C. A. 8th, 1941), certiorari denied 314 U. S. 644, rehearing denied 314 U. S. 711; *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co., Inc., et al.*, 138 F. (2d) 967 (C. C. A. 7th, 1943), certiorari denied 321 U. S. 792. Other jobber treble damage cases to the same effect are: *Leonard* v. *Socony-Vacuum Oil Co., Inc., et al.*, 42 F. Supp. 369, 370 (D. C. W. D. Wis., 1942); *H. E. Miller Oil Co.* v. *Socony-Vacuum Oil Co., Inc., et al.*, 37 F. Supp. 831 (D. C. E. D. Mo., E. D. 1941); *Farmers Co-Op. Oil Co.* v. *Socony-Vacuum Oil Co., Inc. et al.*, 133 F. (2d) 101, 103, (C. C. A. 8th, 1942).

These decisions are in accord with the well-settled rule that actual pecuniary loss is the gist of an action under Section 4 of the Clayton Act or the substantially similar Section 7 of the Sherman Act. As stated by Mr. Justice

Holmes in *Chattanooga Foundry and Pipe Works* v. *City of Atlanta,* 203 U. S. 390 (1906):

> "* * * A man is injured in his property when his property is diminished * * *" (p. 399).

Other treble damage cases to the same effect are: *Foster & Kleiser Co.* v. *Special Site Sign Co.,* 85 F. (2d) 742, 750 (C. C. A. 9th, 1936), certiorari denied 299 U. S. 613; *Glenn Coal Co.* v. *Dickinson Fuel Co., et al.,* 72 F. (2d) 885, 887 (C. C. A. 4th, 1934); *Jack* v. *Armour & Co., et al.,* 291 F. 741, 745 (C. C. A. 8th, 1923); *Locker, et al.* v. *American Tobacco Co., et al.,* 218 F. 447, 448 (C. C. A. 2d, 1914).

III.

There Is No Conflict Between the Decision in the Present Case and That of the Second Circuit in Straus, et al. v. Victor Talking Mach. Co., et al., 297 F. 791 (C. C. A. 2d, 1924).

Petitioners urge as a ground for jurisdiction in this Court that the decision in this case is in conflict with that of the Second Circuit Court of Appeals in *Straus, et al.* v. *Victor Talking Mach. Co., et al., supra.*

The plaintiff in the Straus Case was a retailer who had been accustomed to buying Victor products at wholesale prices. Because plaintiff refused to abide by certain trade practices imposed by the Victor Company, that company refused to permit Straus to continue to buy at wholesale. His competitors continued to receive the benefit of the wholesale prices. In order to supply his customers, Straus was forced to buy Victor products on the retail market.

This case does not conflict with the present one because:

(1) Straus was forced from a wholesale to a retail market. In other words, Straus was forced to buy and sell on the retail market. *He thus suffered an actual pecuniary loss which was measured exactly by the increase in the price to him.*

(2) Only the price to Straus was raised and he was the only one injured as a result of the conspiracy. His selling price was not raised. In the present case the whole market structure has been raised as a result of the conspiracy and the consumer has borne the increase in price.

(3) In the present case, petitioners do not deny the fact that there was an increase in the whole market structure of gasoline and in addition that they were protected by the guaranteed margin provision of their contract, and they admit that they are not claiming any lessening in their margins.

(4) The Straus Case was urged upon the Eighth Circuit Court of Appeals in *Twin Ports Oil Co.* v. *Pure Oil Co.*, 119 F. (2d) 747 (C. C. A. 8th, 1941), and upon the Seventh Circuit Court of Appeals in *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co., Inc., et al.*, 138 F. (2d) 967 (C. C. A. 7th, 1943); it was urged upon the Supreme Court in the petition for writ of certiorari which was filed in each of such cases, and the petitions were denied (314 U. S. 644; 321 U. S. 792). In view of the many antitrust decisions holding that pecuniary loss is essential to recovery under the antitrust laws, statements in the Straus Case must be considered in the light of the facts of that case which established that a pecuniary loss had been sustained in the amount of the increase in price which was the difference between the wholesale price and the price paid by Straus.

IV.

There Is No Conflict Between the Decision in the Present Case and the Freight Rate Overcharge Cases and Other Cases Relied Upon by Petitioners.

In support of their contention that they can recover the amount of the increased price as such, petitioners rely on certain freight rate or tariff overcharge cases. These cases are not applicable. The recovery of a tariff overcharge

under the Interstate Commerce Act (49 U. S. C. A. Section 1) differs from a recovery under the Clayton Act, in the following respects:

(1) A tariff overcharge is recoverable as a matter of law, without showing a pecuniary loss, *Louisville & Nashville Railroad Co.* v. *Sloss-Sheffield Steel & Iron Company*, 269 U. S. 217, 235 (1925); *New York, N. H. & H. R. Co., et al.* v. *Ballou & Wright*, 242 F. 862, 867 (C. C. A. 9th, 1917); *Doughty-McDonald Grocery Company, et al.* v. *Atchison, Topeka & Santa Fe Railway Company, et al.*, 155 I. C. C. 47 (1929).

(2) As the recovery is of the tariff overcharge as such, only persons in privity with the carrier are entitled to recover—thus, suit must be brought by the one who paid the overcharge and against the carrier which collected the overcharge. *Southern Pacific Company, et al.* v. *Darnell-Taenzer Lumber Company, et al.*, 245 U. S. 531, 534 (1918); *Missouri Portland Cement Company* v. *Director General, as Agent*, 88 I. C. C. 492, 495, 496 (1924); *Nicola, Stone & Myers Company* v. *Louisville & Nashville Railroad Company, et al.*, 14 I. C. C. 199, 209 (1908).

(3) An action under the Clayton Act is not for recovery of an overcharge as such, but is "for threefold the damages by him sustained." Recovery is not limited to persons in privity with the wrongdoer but extends to all persons who have suffered pecuniary loss as a proximate result of the illegal act. A conspirator is liable though he has no dealings with the injured party. The amount of damages may be more or less than the amount of any increase in the price.

Thus, the Interstate Commerce Act authorizes the recovery of a tariff overcharge by the one who pays it in the first instance; the Clayton Act authorizes the recovery of the damages sustained.

The distinctive character of the railroad rate overcharge cases, which do not require proof of pecuniary loss, is emphasized by the fact that in suits by persons under the

Interstate Commerce Act for a violation of Section 2 (unjust discrimination provision) or for a violation of Section 4 (the long-and-short-haul provision), pecuniary loss must be established. *Pennsylvania Railroad Company* v. *International Coal Mining Company,* 230 U. S. 184, 202-203, 206 (1913); *Davis* v. *Portland Seed Company,* 264 U. S. 403 (1924).

The Clayton Act is subject to the same rules of proof as announced in the International Coal Case, and the so-called rate reparation cases construing Section 1 of the Interstate Commerce Act are wholly inapplicable. *Keogh* v. *Chicago & Northwestern Railway Company, et al.,* 260 U. S. 156, 164-165 (1922).

Petitioners cite *Chattanooga Foundry and Pipe Works* v. *City of Atlanta,* 203 U. S. 390, 399 (1906) in which the plaintiff was injured because its property was diminished. The City of Atlanta had purchased pipe for its own use in its own city water system and the pipe was not purchased for resale. Thus, the city was a consumer and it bore the illegally increased price. The City of Atlanta, therefore, actually sustained a pecuniary loss which was measured by the amount of the illegally increased price of the pipe.

Petitioners further cite *Thomsen, et al.* v. *Cayser, et al.,* 243 U. S. 66 (1917), and *Story Parchment Company* v. *Paterson Parchment Paper Company, et al.,* 282 U. S. 555 (1931). In each of these cases the plaintiff had actually suffered a loss and the courts do not even suggest that the payment of an increased price, in and of itself, gives rise to a right to recover the increase without proof of loss. It is true that the amount of an increase in a price may equal the amount of pecuniary loss sustained. This would follow where a person paying the amount of an illegal increase in price has borne the full amount of the increase, but petitioners do not claim that they have borne all, or

any part, of the increase. As stated by the Circuit Court of Appeals, petitioners are seeking "not compensation for damages suffered by defendants' illegal acts, but profits because of said acts."

V.

If Compliance With Rule 38 Is Jurisdictional, the Petition for Writ of Certiorari Should Be Denied Because Petitioners Did Not Serve Respondents With a Copy of the Record Within Ten Days After the Filing in the Supreme Court.

If the Court considers that compliance with Rule 38 is jurisdictional, we call the Court's attention to the following: Petitioners served counsel for respondents with a copy of the petition and supporting brief on July 5, 1945; they filed the record, petition and brief in the Supreme Court on July 10, 1945; and counsel for respondents received from petitioners a copy of the record on July 26, 1945.

WHEREFORE, respondents pray that the petition for writ of certiorari be in all things denied.

Respectfully submitted,

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